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No. 85-426 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SAVE THE DUNES COUNCIL, INC.,

Petitioner

and

UNITED STATES OF AMERICA,

Respondent

v.

36.96 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA, AND NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Council has established a basis minimally sufficient for granting the petition.

2. Whether the Seventh Circuit properly denied a plaintiff-intervention as of right by Council in an eminent domain proceeding.

3. Whether the District Court abused its discretion in denying permissive intervention to Council.

In accordance with Sup. Ct. R. 28.1, we note the Respondent Northern Indiana Public Service Company does not have a parent company, and all its subsidiaries are wholly owned.

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STATEMENT OF THE CASE

A. Nature of the Case.

The petition for writ of certiorari is filed to review an order of the United States Court of Appeals for the Seventh Circuit, dated February 22, 1985 (Pet. for Cert. A-1). The Seventh Circuit denied a petition for rehearing on April 4, 1985 (Pet. for Cert. A-13).

Petitioner appealed to the Seventh Circuit from an order entered by the United States District Court for the Northern District of Indiana, Hammond Division on December 8, 1983. That order denied the petition of the Save the Dunes Council, Inc. (Council) to intervene under Fed. R. Civ. P. 24 in an eminent domain proceeding as a co-plaintiff with the government to condemn property owned by Northern Indiana Public Service Company (NIPSCO) (Pet. for Cert. A-14). The action arose out of NIPSCO's objections to the attempt of the United States of America (United States) to appropriate a portion of its Lake Michigan shoreline under the Indiana Dunes National Lakeshore Act, 16 U.S.C. §§ 460u-12.

B. Course of Proceedings.

On August 4, 1978, the United States filed its complaint in condemnation seeking the appropriation of a 36.96 acre parcel of land known as Crescent Dune adjacent to NIPSCO's Michigan City Generating Station for inclusion into the Indiana Dunes National Lakeshore. The complaint avers that authority for the appropriation arises from: Condemnation Act of 1888, 40 U.S.C. § 257 (1888); Land and Water Conservation Act, 16 U.S.C. § 4601–4, 1 *et seq.* (1965); Indiana Dunes National Lakeshore Act, 16 U.S.C. § 460u *et seq.* (1966); and Department of the Interior and Related Agencies Appropriation Act, 91 Stat. 287 (1978).[1] NIPSCO filed its Answer, Objections to Condemnation

[1]Complaint filed by the United States, Pet. for Cert., A-19.

and Motion to Sustain Objections on September 25, 1978.[2] The substance of the objections is that the United States had failed to comply with limitations prescribed in the Congressional grant of authority to condemn the specific land in question *viz* "[t]he Secretary shall acquire the area on the map referred to in Section 460u of this title as area III-B within two years from the effective date of this section only if such area can be acquired for not more than $800,000 . . ." 16 U.S.C. § 460u-12.[3]

The District Court initially took no action on the NIPSCO objections during the late Honorable Phil McNagy's tenure. Then on October 7, 1981, the case was set for pre-trial conference before a new Magistrate on the issue of damages. On October 26, 1981, NIPSCO filed a request for hearing on its objections again bringing them to the Court's attention so that on November 2, 1981, the Court by, the Honorable William Lee, acknowledged that the request for hearing was well taken, ordered the United States to file a brief in response, and generally continued the pre-trial conference until after a determination was made on the United States' authority to appropriate. On December 21, 1981, the United States filed its memorandum in response to objections Thereafter, as a result of a subsequent status conference before the Magistrate held January 4, 1982, the parties filed on January 12, 1982, a joint motion for extension of time regarding the existing trial setting based upon their mutual attempts to compromise by providing for a "scenic easement" in lieu of condemnation of the fee. The District Court granted the requested continuance and vacated the trial setting by order dated January 22, 1982.

On April 2, 1982, Council filed its Motion to Intervene as a Plaintiff under Fed. R. Civ. P. 24, along with the accompanying

[2]NIPSCO's Answer, Objections to Condemnation and Motion to Sustain Objections, Appendix to Brief, A-1.

[3]NIPSCO urged that the government's complaint improperly sought to condemn a quantum of land other than the authorized Area III-B and that the appraised value of Area III-B was above the $800,000, figure upon which acquisition was conditioned.

affidavit of Charlotte J. Read. Council's purpose was apparently to force the United States to condemn the land. NIPSCO filed a Response to Motion to Intervene and Motion to Strike the same together with a supporting memorandum on April 8, 1982. The Council replied with its Memorandum in Support of Motion to Intervene and Answers to Motion to Strike filed April 20, 1982.

A hearing on Council's Motion to Intervene was set for September 7, 1983. At that time the United States and NIPSCO entered into a stipulation and joint motion to dismiss. However, Judge Lee recused himself and Judge Allen Sharp heard the matter on October 20, 1983, receiving supplemental memoranda from the parties thereafter. On December 8, 1983, the District Court entered its order denying the intervention by Council and Council appealed

On February 22, 1985, the Seventh Circuit rendered its opinion affirming the denial of intervention by Council as a co-plaintiff in the condemnation of property owned by NIPSCO.

The Court's opinion stated in part:

> The Council cannot claim that its right to intervene derives from this sovereign authority to condemn property for public use. No entity, public or private, other than the legislature, can claim the sovereign authority to condemn property—a "direct, significant legally protectible interest"—unless Congress has delegated that authority to the party.[4]

This petition followed.

C. Factual Background.

The tract of land sought to be appropriated involved 36.96 acres bordering the southern edge of Lake Michigan. It was acquired in fee by NIPSCO together with other portions of its Michigan City Generating Station site from Industrial Land Company, Lake County, Indiana by deed dated June 3, 1932, and

[4] *United States* v. *36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985).

recorded June 21, 1932, in Deed Record 160, pages 393-396, Document Number 20876 of the LaPorte County, Indiana records. NIPSCO's ownership of the real estate is subject to a Mortgage Indenture administered by Harris Trust and Savings Bank and R. G. Mason, Trustees to secure various bond instruments sold by NIPSCO. The parcel of property described as Area III-B in 16 U.S.C. § 460u-12 includes a 1,850 foot steel rock sea wall. The United States' complaint seeks appropriation of Area III-B "[e]xcepting from the above-described tract, the existing sea wall and land lying thereunder." The value of the land including the sea wall as disclosed by legislative history was at the time, approximately $1,762,000 or $962,000 more than the statutory limitation of $800,000. (Senate Report 94-1189, 1976 *U.S. Code Cong. and Adm. News* 5636-5637). At no time has the Council had any legal interest in the 36.96 acre parcel with or without the sea wall. None of its members has any legal authority or right to use the property for any purpose.[5]

II.
SUMMARY OF ARGUMENT

A. The petition fails to establish any "special and important" reason to grant a writ merely because it seeks to obtain intervention of an unrelated private party to monitor the United States' pursuit of an eminent domain proceeding.

B. In the absence of the power of eminent domain, or an ownership interest in the land the petitioner has no interest protectible under Fed. R. Civ. P. 24(a). Similarly, it has no standing to assert the environmental concern it expresses in unused land solely because it is privately owned by another.

C. The petitioner fails to establish an abuse of discretion by the District Court in denying permissive intervention or to establish error by the Seventh Circuit in affirming the same.

[5]See Complaint of the United States with attachments, Pet. for Cert., A-19.

III.

ARGUMENT

A. The Petition Fails to Advance Sufficient Reason to Grant The Writ

The granting of a writ of certiorari in response to Council's petition is discretionary in this Court when, as here, it is based upon 28 U.S.C. § 1254 (1). (Pet. for Cert.)[6] "[R]eview on writ of certiorari is not a matter of right", but a matter committed to the discretion of the Court, which is exercised "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. As the petitioner, Council carries the burden of establishing "special and important" reasons sufficient to justify a grant of a writ of certiorari. *Gardner v. California,* 393 U.S. 367 (1969); Sup. Ct. R. 17.1.

Council fails to meet this burden since the petition fails to describe any "special" or "important" reason as set forth and fails to assert an adequate reason independent of Rule 17.1(a) worthy of the Court's review. The petition merely requests the Court to determine whether a federal court of appeals correctly applied Rules 24 (a) and (b) to the facts of this case. However, with respect to subparagraph (a) of that rule, the law is that "an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court," *Appalachian Power Company v. Am. Inst. of Certified Public Accountants,* 4 L.Ed.2d 30, 32 (1959), and with respect to subparagraph (b) the law is that a matter resting within the discretion of the District Court, such as the question of permissive intervention, cannot be certified. See, *United States v. Thomas,* 151 U.S. 577 (1984). Indeed, evaluation by this Court of whether an intervenor has satisfied the test of Rule 24 occurs only when

[6] 28 U.S.C. § 1254 (1) states in pertinent part:

> Cases in the Court of Appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil . . . case.

some other substantive issue needs to be addressed at the national level such as the vindication of this Court's own order as law of the case, *Cascade Natural Gas Corp. v. El Paso Natural Gas,* 386 U.S. 129 (1967), or "because the case appeared to raise important questions relating to the administration and enforcement of the revenue laws . . ." *Donaldson v. United States,* 400 U.S. 517, 522 (1971). Thus, Sup. Ct. R. 17.1(a) makes plain this Court's "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases as sought here." *Watt v. Alaska,* 451 U.S. 259, 275 n.5 (1981) (Stevens, Jr. concurring).

Given these parameters, the Council attempts to create a "special" and "important" reason for granting the writ by charging that the Seventh Circuit's decision will "substantially undermine the ability of members of the affected public to seek judicial review of government action which frustrates a clear Congressional mandate . . ." However, this assertion mischaracterizes the status of Council, its relationship to the property, the actions of the United States and the purported Congressional mandate.

Council's status is that of a special interest group of private citizens who have, among other things, urged the expansion of the Indiana Dunes National Lakeshore. Its self-proclaimed role, does not change its private character nor do its pronouncements cause its activities to become vested with a greater public interest than that of any other private citizen. Indeed, no matter how intense the feeling of its members, Council is accorded the same status under the law as is the general public whose members may share equally intense but diverse views. *Westlands Water Dist. v. United States,* 700 F.2d 561 (9th Cir. 1983). Council's relationship to the land is non-existent. "With respect to this tract of land it is essentially a private citizen." *U.S. v. 36.96 Acres of Land, LaPorte County, Indiana,* 100 F.R.D. 78 (N.D. Inc. 1983). None of Council's members is able to assert that their use of the subject 36.96 acres is other than a trespass. Conversely, NIPSCO's sole

ownership is irrelevant to the rights of the Council and NIPSCO's ownership has no impact upon Council's members. Analytically then, the interest which Council asks to have recognized is really not a present interest at all but rather an effort to obtain a protectible interest in the future by making private lands public. Such an effort to convert a present political design into a future protectible legal interest is a use of Rule 24 that this Court must eschew. See *Sierra Club v. Morton,* 405 U.S. 727 (1972).

Council's characterization of the United States' action as a frustration of a Congressional mandate is also a red herring. It is the intent of Congress as evidenced by 16 U.S.C. § 460 u-12, that the subject 36.96 acres of property shall be acquired by the Secretary of the Interior for the National Lakeshore only upon fulfilling three conditions.

> The Secretary shall acquire the area on the map referred to in section 460u of this title as area III-B within two years from the effective date of this section only if such area can be acquired for not more than $800,000, exclusive of administrative costs of acquisition, as adjusted by the Consumer Price Index: Provided, that the Secretary may not acquire such area by any means after two years from the effective date of this section.
>
> 16 U.S.C. § 460 u-12.

These Congressionally mandated conditions to acquisition were not fulfilled by the United States. First, the tract of land described in the statute, designed as Area III-B, includes a sea wall improvement yet the United States excluded this valuable improvement in its complaint. Second, the entire Area III-B tract of land had to be acquired within two years after which the property could not be acquired "by any means." Third, the Secretary was barred from making the acquisition of the tract of land described as Area III-B unless it could be procured for not more than $800,000, a figure less than the condemnor's appraisal or the value given the Senate Report. See ante, p. 4. Review of the

record in these proceedings demonstrates that the Secretary of the Interior rather than fulfill the mandate of Congress attempted to act beyond that mandate. Indeed, the United States' attempt to proceed in eminent domain without having fulfilled the conditions for authorization raised due process objections from NIPSCO for which the Secretary of the Interior could be responsible under the *Uniform Relocation Assistance Real Property Acquisition Policies Act of 1970,* 42 U.S.C. § 654. A private party, attempting to intervene as a putative plaintiff, Council would avoid this liability while by its actions expose the United States. Perhaps for these reasons the United States sought its favorable dismissal stipulation with NIPSCO. For similar reasons, "[i]t would be absurd to allow the unilateral conduct of private parties to divest the United States of control over its own litigation." *Rosebud Coal Sales Co. v. Andrus,* 644 F.2d 846, 851 (10th Cir. 1981).

Thus, despite Council's characterizations, the only significance a grant of certiorari might have would be to allow the petitioner, a private party, to monitor the United States' pursuit of an eminent domain proceeding otherwise foreclosed by 16 U.S.C. § 460 u-12, the weakest of reasons to burden further this Court's scarce resources, and a reason which is neither "special" nor "important." See, *Singleton v. Commissioner,* 439 U.S. 940 (1978) (Stevens, Jr., opinion respecting the denial of the petition for writ of certiorari). Accordingly, the Council's petition for writ of certiorari should be denied for its failure to present an issue worthy of this Court's determination.

B. The Seventh Circuit Properly Affirmed the Denial of Intervention Under Federal Rule 24 (a)(2)

The Seventh Circuit was correct to deny the intervention because the Council failed to meet the requirements of Rule 24(a)(2). To intervene as of right the proposed intervenor must demonstrate that its motion was timely filed; that it has an interest relating to the property or transaction which is the subject of the

action; that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and that the interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a). Since all four requirements of the rule must be met before intervention of right will be allowed, *NAACP v. New York*, 413 U.S. 345, 369 (1973), the Seventh Circuit's conclusion that Council had no "direct, significant legally protectible interest" was determinative and the predicate for questioning the scope of protection or other issues under the rule evaporated. If Council has no interest in the pending litigation to warrant intervention as of right *a fortiori* Council cannot claim any impairment in its ability to protect that noninterest.

The history of the amendments to Rule 24 and this Court's discussion of the rule since the 1966 amendments, in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) and *Donaldson v. United States*, 400 U.S. 517 (1971) evidence a desire to attach some measure to the practical consequences felt by a potential intervenor if excluded from the litigation. Nevertheless, this process still requires identification of a "direct, substantial, legally protectible interest in the proceedings" as a threshold question. *Hobson v. Hansen*, 44 F.R.D. 18, 24 (D.C.D.C. 1968). Thus, the "[interest] requirement should be viewed as a prerequisite" and in this sense, it is still the determinative criterion for intervention. *Smuck v. Hobson*, 408 F.2d 175, 182 (D.C. Cir. 1969).

This Court's *Cascade* decision, recognized the concept of an economic interest as a condition for intervention. In *Cascade* the majority was concerned with whether a decree agreed upon by the Attorney General and the gas companies and approved by the District Court, properly carried out the Supreme Court's prior mandate that certain distribution assets be in the custody of a new company on the theory that such an allocation would be conducive to greater gas competition in California. Under such circumstances, it was felt the Cascade Natural Gas Company had

an important economic interest in obtaining a decree that assured the existence of its sole supplier as a feasible enterprise in the future.

> [T]he circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights, thus, sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.
>
> *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra,* at 135 quoting *Missouri-Kansas Pipeline Co. v. United States,* 312 U.S. 502, 506 (1941).

Thus, in *Cascade* this Court found an economic interest in the transaction sufficient to warrant focus on the remaining elements of practical harm to the applicant and the adequacy of representation by others upon which intervention was ultimately allowed.

In *Donaldson v. United States, supra,* this Court spoke more directly to the language of Rule 24(a). There the plaintiff had unsuccessfully sought intervention in a summary tax proceeding to prevent disclosure by third parties of their records which might implicate him relative to his tax liability. The unanimous Court concluded that the records sought by the subpoenas were the employer's routine business records in which Donaldson had no proprietary interest of any kind and regarding which he could make no claim of privilege.

> The nature of the "interest" urged by the taxpayer is apparent from the fact that the material in question (once we assume its relevance) would not be subject to suppression if the Government obtained it by other routine means, such as by Acme's independent and voluntary disclosure prior to summons, or by way of identifiable deductions in Acme's own income tax returns, or through Mecurio's appearance as a trial witness, or by subpoena of the records for trial. This interest

> cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a significantly protectible interest.
>
> *Id.* at 531.

The Seventh Circuit's determination of the instant case in reliance upon its precedent in *Wade v. Goldschmidt,* 673 F.2d 182, 185 (7th Cir. 1982) takes full cognizance of these Supreme Court pronouncements regarding intervention. *Wade* requires "a direct, significant legally protectible interest in the property or transaction," before intervention will be allowed. It considers as closely related issues the nature of an intervenor's interest in the property or transaction and the effect that the disposition of the action may have on his ability to protect that interest. *Hobson v. Hansen, supra,* at 30. 7A C. Wright & A. Miller, *Federal Practice and Procedure,* § 1913, at 551–52 (1972). Further *Wade* states that:

> . . . an interest to satisfy the requirements of Rule 24(a)(2) must be significant, must be direct rather than contingent, *and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit.*
>
> *Id.* at 185n.5 citing In re *Penn Cent. Commercial Paper Litigation,* 62 F.R.D. 341, 346 (1974). (Emphasis added).

Thus, in accord with *Wade* the Seventh Circuit made an analysis of the significance of the interest sought to be vindicated, the standing of the proposed intervenor to assert a right with respect to that interest and the relationship of the proposed intervenor's ostensible right to vindicate that interest relative to the original parties' rights. See, *Heymen v. Exchange National Bank of Chicago,* 615 F.2d 1190 (7th Cir. 1980). Council's Motion to Intervene failed in each of these areas of focus and the Seventh Circuit properly followed its *Wade* holding as a statement of the law.

1. Absent The Power Of Eminent Domain Or An Ownership Interest In The Subject Parcel The Council Has No Significant Interest In The Pending Litigation.

An eminent domain proceeding considers only two legal interests. The first is that held by the sovereign to exercise the power of eminent domain. *United States v. Carmack*, 329 U.S. 230, 236 (1946). It is not shared by a private party being peculiar to the sovereign in a manner different from certain administrative, regulatory or police power functions. See, *United States v. 58.16 Acres of Land, Etc.*, 478 F.2d 1055 (7th Cir. 1973). The sole question to be determined relative to the sovereign's power or "interest" concerns whether Congress has granted specific authority to make the appropriation sought for a public use. Congress alone has discretion to exercise or delegate the power of eminent domain. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586–86 (1952).

> Once the question of the public purpose has been decided the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislature branch.
>
> *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

In this case, the authorization given by Congress to the Secretary of the Department of the Interior contains specific and detailed conditions limiting the circumstances under which property adjoining the National Lakeshore can be appropriated. This is the "interest" of the sovereign in the pending litigation as expressed in the Indiana Dunes National Lakeshore Act, 16 U.S.C. § 460 u *et seq.*, and it is an interest that the Secretary may or may not wish to pursue in contesting NIPSCO's position that the United States acted outside the scope of Congressional authority. Council cannot claim that its right to intervene derives from this sovereign authority to condemn property for a public use. No entity, public or private can claim the sovereign authority to condemn

property unless Congress has delegated it such authority. *Youngstown Sheet & Tube, supra,* at 585. Nor can Council claim to have some special relationship with the sovereign *vis-a-vis* NIPSCO which would allow it to intervene as a plaintiff to dispossess the private owner. In short Council has no legally protectible interest in whether the United States exercises its exclusive power to eminent domain or whether the United States in these proceedings should contest NIPSCO's legal objection to the purported right to take.

The second legal interest in an eminent domain proceeding is one of private ownership. The Fifth Amendment mandates that (a) "No person shall . . . be deprived of . . . property, without due process of law"; (b) "nor shall private property be taken for public use, without just compensation." See, *Berman v. Parker, supra* at 31. Here, the ownership interest is exclusively in NIPSCO. As the District Court found, "the party with the paramount interest, indeed, the only legal interest in the land at issue is NIPSCO." (Pet. for Cert. A-18). No less an interest is protectible in this *in rem* action brought against the land itself. Fed. Rules Civ. Pro. 71 A(c). Indeed, under due process standards, it is NIPSCO, which is entitled to judicial review of the United States' action not the Council. See, *Shoemaker v. United States,* 147 U.S. 282 (1893).

Under these circumstances, to allow a private party to intervene as a plaintiff representing a putative interest in a federal eminent domain proceeding would be to abandon the language of Rule 24. There is no justification in *Cascade Natural Gas Corp. v. El Paso Natural Gas, supra,* to support this given Council's lack of an economic interest. Likewise, Council can claim no "significantly protectible interest" relating to the proceedings under *Donaldson v. United States, supra.* Indeed, applicable to these circumstances is the requirement that the potential intervenor's interest must be the same as that described for determining whether one is the "real party in interest" as that term is used in Fed. R. 17 (a). See, *United States v. 936.71 Acres of*

Land, Etc., 418 F.2d 551, 556 (5th Cir. 1969). This would designate only those parties capable of intervention "who by substantive law, possess the right sought to be enforced." *Id.* at 556. Council acknowledges this standard by stating that its interest must be "substantive and specific, distinguishable from policy concerns of the general public." (Pet. for Cert. p. 17). Manifestly it cannot meet these standards, and thus, is foreclosed from intervention.

2. Council Has No Standing To Assert The Environmental Concern It Expresses In These Proceedings

Whether a would-be intervenor has the required interest in the subject matter of the litigation is in part a question of standing. *Fred Harvey, Inc. v. Mooney*, 526 F.2d 608, 613 (7th Cir. 1975). While an intervenor need not demonstrate the same degree of standing as that required to initiate litigation, he must nevertheless have his own injury at stake in the lawsuit before he can intervene. "[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club v. Morton, supra*, at 738.

Council fails this standing test being unable to demonstrate injury to itself or its members through NIPSCO's ownership of Crescent Dune. Council's "intense concern for the National Lakeshore" and "its members' personal aesthetic conservational and recreational interest in the property" create no legal right in the Council to change the ownership of the property in question. (See Pet. for Cert. App. 5). This Court rejected Sierra Club's similar argument regarding its members' putative interest in the administration of federally owned land stating:

> Some courts have indicated a willingness to take this latter step [abandoning the requirement that the party seeking review must himself have suffered an injury] by conferring standing upon organizations that have demonstrated an "organizational interest in the problem" of environmental or consumer protection.

> But a mere "interest in a problem," no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" . . .
>
> [I]f a "special interest" in this subject were enough to have entitled the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.
>
> *Id.* at 738–39.

Council conspicuously ignores both the holding in *Sierra Club* that there was no standing in the plaintiff despite the intense concern of its members in environmental issues, and the rationale behind *Sierra Club*, that the members could demonstrate no actual use of the federally owned lands or unique interest in the proposed use by others to warrant recognition of the Club's asserted "aesthetic, conservational and recreational values." In this context, NIPSCO's private ownership of Crescent Dune forecloses any claim by Council of actual harm to its members in the use of the property. Likewise, NIPSCO's continued ownership causes no deprivation to Council's members of any "aesthetic, conservational, and recreational values."

Glossing over the distinction between standing to mandate the preservation of the existing National Lakeshore and standing to condemn additional private property for it, works an injustice to the respective rights of private parties and to a system which protects them from the interference of others.

> The requirements that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through

> the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.
>
> *Sierra Club v. Morton, supra,* at 740.

The Seventh Circuit's reliance upon its *Wade v. Goldschmidt,* holding that the right asserted belong "to the proposed intervenor rather than to an existing party" addresses this fundamental aspect of standing. "Intervention as of right presupposes that the applicant has a right to maintain a claim for the relief sought . . ." *Solien v. Miscellaneous Drivers & Helpers U. Loc. No. 610,* 440 F.2d 124, 132 (8th Cir. 1971). Here the moving party does not have the independent right to maintain the claim. Accordingly, since Council could not have brought the original action in eminent domain proceedings to dispossess NIPSCO and since Council can demonstrate no "discrete and palpable" injury in NIPSCO's continued ownership of Crescent Dune, it has no standing to intervene. *Worth v. Seldin,* 422 U.S. 490, 501 (1975).

C. THE DISTRICT COURT PROPERLY DENIED COUNCIL'S MOTION FOR PERMISSIVE INTERVENTION UNDER FEDERAL RULE 24(b)

To qualify for permissive intervention the proposed intervenor should demonstrate both that his claim is timely and that the claim and the main claim "have a question of law or fact in common." Further he must show the intervention "will [not] unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). Within these criteria, permissive intervention is wholly discretionary with the District Court. *Brewer v. Republic Steel Corp.,* 513 F.2d 1222 (6th Cir. 1975).

"It is said that it is a discretion that is to be exercised 'carefully,' but it is well-settled that an appellate court can interfere, if at all, only for an abuse of discretion." 7A.C. Wright and A. Miller, *Federal Practice and Procedure*, § 1913, at 551–52 (1972); *EEOC v. United Air Lines, Inc.*, 515 F.2d 946 (7th Cir. 1975).

> The question on appeal . . . is not whether those factors [of permissive intervention] were present, but whether the trial court committed a clear abuse of discretion in denying the motion.
>
> *Korioth v. Briscoe*, 523 F.2d 1271, 1278 (5th Cir. 1975) citing *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944).

In the case at bar the District Court correctly held that permissive intervention would be inappropriate. As previously noted, none of Council's requests are cognizable in an eminent domain proceeding. Council has no power to condemn and it has no ownership in the subject property. Thus, none of the proposed intervenor's claims and the present action have a question of law or fact in common such as would satisfy the requirement for permissive intervention under the rule. *Wade v. Goldschmidt, supra*, at 187. Similarly, when as here, the original parties have jointly moved for a dismissal of the action, Council's attempt to continue the litigation "will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

Permissive intervention must also be denied Council because there is no independent jurisdictional ground upon which Council has access to the federal courts. *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970). Unlike intervention as of right which being ancillary to the original proceeding relies upon it for jurisdiction, "permissive intervention in an *in personam* action other than a class action must be supported by independent grounds . . ." *Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975). Since Council is an Indiana corporation, as is NIPSCO, and since Council cannot share with the United States

an eminent domain authority, or its *in rem* status, neither diversity nor federal question grounds are available to support the independent jurisdiction required for permissive intervention. See, *Toles v. U.S.*, 371 F.2d 786 (10th Cir. 1967). There, in an action by the United States to confirm the taking of land and to determine just compensation, the grantees of landowners could not intervene to assert a claim against their grantors who were defendants since their claim was independent of the original action and diversity was lacking between the grantors and grantees.

In the same jurisdictional context, a permissive intervenor must also file with his motion a proposed complaint within the time of any applicable statute of limitation. *Jack v. Travelers Insurance Co.*, 22 F.R.D. 318, 319 (E.D. Mich. 1958). Filing of a timely complaint with respect to a permissive intervenor is thus not only procedurally required in Rule 24(c) but also substantively required to legitimize the intervenor's independent claim. *Securities & Exch. Com'n v. Keller Bros. Securities Co.*, 30 F.R.D. 532 (D.C. Mass. 1902).

In this case, Council has filed its alleged claim after the limitation period set forth in 16 U.S.C. § 460 u-12. According to the statute, Area III-B must be acquired within two years of its effective date, October 18, 1976. See, 16 U.S.C. § 460 u-12, Anno. 1. Since Council's Motion to Intervene and Proposed Complaint were filed April 2, 1983, three and one half years after the October 18, 1978 deadline, its claim is insufficient to withstand summary dismissal as a matter of law. Fed. R. Civ. P. 24(c); *United States v. 635.75 Acres of Land, Etc.*, 319 F.Supp. 763, 766 (W.D. Ark. 1970). Under such circumstances there is no abuse of discretion in the District Court's denial of permissive intervention.

IV

CONCLUSION

Because the lower court adhered to the legal criteria required in denying the intervention and because Council has failed to provide a sufficient reason why this Court should grant certiorari, the petition should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

36.95 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA, and NORTHERN INDIANA PUBLIC SERVICE COMPANY, an Indiana corporation, et al, and UNKNOWN OWNERS,
Defendants.

CIVIL NO. H 78-317
TRACT NO. 96-101

ANSWER, OBJECTIONS TO CONDEMNATION AND MOTION TO SUSTAIN OBJECTIONS

The defendant, Northern Indiana Public Service Company, objects to the attempt of the United States of America to take its property and as such objection, alleges and says:

1. The defendant's land is described in the complaint in condemnation as "A tract of land situated in the Southeast Quarter, Section 30 and the Northeast Quarter, Section 31, Township 38 North, Range 4 West, 2nd Principal Meridian, being more particularly described as follows:

> All that part of the Southeast Quarter of said Section 30, and that part of the Northeast Quarter of said Section 31, lying Northwesterly of a line described as follows: Commencing at the northwest corner of the Northeast Quarter of said Section 31; thence South, along the North-South centerline of said Sections 30 and 31, 263.14 feet, more or less, to the Northern right of way line of an existing 132 KV tower line right of way; thence North 36°16′ East, to the south line of said Section 30; thence continuing North 36° 16′ East, 2,750.00 feet; thence at right angles to the last described line, Northwesterly to the Water's edge of Lake Michigan. Excepting from the above described tract, the existing sea wall and land lying thereunder.

Said tract contained 36.95 acres, more or less."

CERTIFICATE OF FILING
CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 28.5(b) I, Paul A. Rake, a member of the Bar of this Court representing Northern Indiana Public Service Company, the Respondent herein, hereby certify that on the 11th day of October, 1985 in accordance with Sup. Ct. R. 28.2 and 28.3, I deposited in the United States post office located at 433 W. Van Buren, Chicago, Illinois 60607, with first-class postage prepaid, 41 printed copies of the Respondent Northern Indiana Public Service Company's Brief in Opposition to the Petition for Writ of Certiorari, addressed to the Clerk of the United States Supreme Court for filing and further by the same method served 3 printed copies of the same to the following counsel:

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